Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991
No. 91-904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

v.

CONSTRUCTION LABORERS PENSION
TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY ON PETITION FOR WRIT OF CERTIORARI

JAMES M. NELSON, Attorney of Record
DENNIS R. MURPHY

DIEPENBROCK, WULFF, PLANT & HANNEGAN
300 Capitol Mall, Suite 1700
P.O. Box 3034
Sacramento, CA 95812-3034
Telephone: (916) 444-3910

QUESTIONS PRESENTED FOR REVIEW

1. Did 29 U.S.C. § 1401 permit the district court to order the parties to arbitrate the question of statutory interpretation which determines the existence of the arbitrator's and Court's jurisdiction?

2. Do the presumptions in 29 U.S.C. § 1401 favoring multi-employer plans like Construction Laborers Pension Trust for Southern California (hereafter "CLPT") violate the due process rights of Concrete Pipe and Products by denying access to an impartial decision maker?

3. Does 29 U.S.C. § 1383 permit respondent multi-employer plan to convert a pre-MPPAA complete cessation of the covered operations into a post-MPPAA withdrawal?

4. Do the provisions of the Multi-Employer Pension Plan Amendments Act (hereafter "MPPAA") violate the Fifth Amendment rights of Concrete Pipe and Products, *as applied*, by retroactively imposing withdrawal liability on an employer who never had employees vested in the pension plan and whose collective bargaining agreements specifically limited liability to contributions made?

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I
INTRODUCTION

Petitioner Concrete Pipe and Products of California, Inc. ("Concrete Pipe and Products") submits this reply pursuant to Supreme Court Rule 15.6, and limits it to issues which affect the suitability of this case for review on the merits, pursuant to Supreme Court Rule 10. Much of the opposition brief is devoted to the merits of the case, and the parties clearly have significant disputes on the applicable legal principles and analysis. Petitioner's limitation of the reply to those points within the opposition brief which impact on the pending petition for writ of certiorari should not be construed as either a waiver or acquiesence in the characterization of the facts and issues in the opposition brief on the merits.

This reply will analyze those points applicable to the pending determination on the writ of certiorari in the same sequence and cross-referenced to the questions presented for review. The questions presented for review are duplicated for the court's convenience as page -i- in this brief. Concrete Pipe and Products submits that the opposition simply underscores the need for the Court to grant the pending petition and resolve the issues on the merits.

II
ARGUMENT

A. The Circularity of Various Courts' Analysis of the Jurisdiction Issue Supports Granting the Writ of Certiorari on the First Question Presented for Review.

Whether a court has the power to compel parties to arbitrate a dispute is clearly a question of jurisdiction, which, in this case, turns on the interpretation of 29 U.S.C. § 1401. The statute here requires arbitration of disputes "concerning a determination made under" 29 U.S.C. §§ 1381 through 1399. The question remains as to who determines whether a given dispute is "under" the identified statutory sections. In this case, the date Concrete Pipe and Products withdrew from the plan is outcome-determinative of whether this is a dispute "under" the statute. The parties obviously have a difference of opinion on this question with Petitioner favoring the district court and the Trust Funds favoring the arbitrator.

The Court should grant review to resolve this question and supersede the circular reasoning reflected in the lead case cited in opposition. *Teamsters Pension Trust Fund Board of Trustees v. Allyn*

Transportation Company, 832 F.2d 502 (9th Cir. 1987) clearly states the issues at page 504, but then decides the issue by begging the question. *Allyn Transportation* resolves the question in favor of letting the arbitrator decide by doing no more than quoting the statute and stating 'Congress clearly intended exactly what those words import.' *Id.* at 506.

Although Petitioner believes that this issue should be resolved by compelling the Court, in the first instance, to make such factual findings as are necessary to establish arbitrability, the state of the law in this regard should be clarified, and this case provides an opportunity to set forth some guidelines for determining those disputes which are arbitrable under 29 U.S.C. § 1401 (a).

B. The Court Should Grant Review of the Second Question Presented for Review Because the Constitutionality of the 29 U.S.C. § 1401 Presumptions Is As Unsettled Today As It Was in 1987.

The debatable constitutionality of the 29 U.S.C. § 1401 presumptions has not been resolved in the years since the question evenly divided this Court in *PBGC v. Yahn & McDonnell, Inc.,* 481 U.S. 735 (1987). By definition, four members of this Court believed that this issue was of sufficient importance to grant *certiorari* in *Yahn & McDonnell* on this issue in 1987. The opposition refers to the Third Circuit's decision in *United Retail and Wholesale Employees, Teamster Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.,* 787 F.2d 128 (3rd Cir. 1986) as a "sole aberrational case," but ignores the fact that three members of this Court voted to affirm that decision, three members of the Court voted to reverse, two members did not participate, and one seat was vacant.

It may be the case that the current composition of this Court will not find this issue to be as divisive as it was in 1987, but the issue and the split in the Circuits should be resolved.

C. The Court Should Grant Review of the Third Question Presented for Review to Resolve a Fundamental Question Regarding the Conduct which Constitutes a Withdrawal Under MPPAA and Reduce the Burden on Interstate Commerce.

The Petition and the Opposition, when read together, identify a significant problem with the definition of withdrawal under 29 U.S.C. § 1383. The opposition obscures the level of disagreement on the role which intent plays in this analysis. The arbitrator said he was finding

that intent was completely irrelevant to the permanent cessation of covered operations issue but nonetheless issued alternative findings, both of which relied heavily on findings of fact regarding intent. Judge Hupp disagreed with the arbitrator and found that intent was a relevant factor.

The Constitutional justification for ERISA (and, therefore, MPPAA) is the commerce clause. *See* 29 U.S.C. § 1003, *et seq.* The third question presented for review would permit the Court to clarify the circumstances under which employer conduct constitutes a permanent cessation of covered operations. Resolving this issue would also give guidance to plan fiduciaries and those employers who may be contemplating the "recycling" of prior facilities. If any subsequent operations at a previously abandoned site can trigger withdrawal liability, those contemplating the investment of capital deserve fair warning if the goal of promoting the free flow of interstate commerce is to be achieved.

D. The Constitutionality of MPPAA, *As Applied*, Deserves Review Even Though the Opposition Is Generally Non-Responsive.

The opposition's reliance on *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984); and *Connolly v. PBGC*, 475 U.S. 211 (1986), is non-responsive and misleading. Both of these cases dealt with facial challenges to MPPAA.

Petitioner's challenges are to the statute *as applied to it*. Petitioner made an effort to deal directly with those issues which the concurring opinion in *Connolly* specifically said had not been addressed by this Court. These unresolved issues which are directly raised in this petition were among those identified in the concurring opinion as having the potential for constitutional infirmity in the appropriate factual circumstance. Concrete Pipe and Products believes that it has demonstrated its circumstances are precisely those about which the *Connolly* concurring decision was concerned.

The Court should grant the writ of certiorari as to this question to eliminate the uncertainty regarding the constitutionality of the statute as applied. Petitioner asserts that if there is room for constitutional challenge to the statute as applied to small and peripheral withdrawing employers, the facts of this case provide an opportunity for the Court to set forth appropriate guidelines. However, if the Court is of the opinion that the statute is constitutional even though it permits a pension plan to

seize virtually all of the assets of an employer with no vested employees in the plan, the Court should grant the pending writ of certiorari so that other litigants similarly situated to petitioner and respondent here do not consume resources on this legal question.

One area where factual inaccuracy in the opposition may impact on this Court's decision to grant or deny certiorari is the discussion on page 26 asserting that Concrete Pipe and Products cannot contend that none of the unfunded vested liability constituting the withdrawal liability assessment is attributable to Concrete Pipe and Products. The trust funds support this position by claiming it would be impractical to trace each employee of Concrete Pipe and Products "over the following decades to see which became vested at various times." *See* Opposition, p. 26. The problem with this factual assertion is that it completely mischaracterizes both the factual and legal character of withdrawal liability under the MPPAA scheme.

Withdrawal liability is, by definition, the allocable amount of unfunded *vested* benefits attributable to the withdrawing employer at the time of withdrawal. 29 U.S.C. §§ 1381, 1382. The statutory limitation of withdrawal liability to the recovery of a portion of unfunded vested benefits necessarily means that whether former employees vest in the future is completely irrelevant to the computation. In fact, the potential for future contingent liability for individuals who may become vested is not even part of the withdrawal liability calculation formula. Thus, it is absolutely correct as a factual and legal matter for Concrete Pipe and Products to note that none of the respondent Trust Funds' unfunded vested liability could be attributable to Concrete Pipe and Products' employees because none of those employees were vested. Since none were vested, none of the liability which the Trust Funds seek to assess could represent pension benefits payable to Petitioner's employees. Concrete Pipe and Products is, therefore, the ideal party to raise the constitutionality of the statute as applied to those employers who have no vested employees in the plan making.

III
CONCLUSION

Concrete Pipe and Products respectfully suggests that the opposition merely serves to confirm the appropriateness and the need to grant the pending writ and hear this case on the merits.

DATED: May 14, 1992

DIEPENBROCK, WULFF,
PLANT & HANNEGAN

By: _____
DENNIS R. MURPHY
JAMES M. NELSON, Attorneys for
Petitioner Concrete Pipe and
Products of California, Inc.